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No. 78-1908

In the

Supreme Court of the United States

OCTOBER TERM, 1978

JOHN KOWALSKI, JOHN JURISS, FRANK KRAUSE and JOHN McDONALD,

Petitioners,

vs.

LAWRENCE BUTLER, RON JACKSON, CHARLES JAMES, MONROE JENKINS, JAMES NASH and ESTATE OF NATHAN NASH, DECEASED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Lawrence Butler, Ron Jackson, Charles James, Monroe Jenkins, James Nash, and Estate of Nathan Nash, Deceased, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 29, 1978, previously filed on behalf of petitioners John Kowalski, John Juriss, Frank Krause, and John McDonald.

ORDERS AND OPINIONS BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 29, 1978 (Petitioners' Appendix A at 1a-8a). The opinion has been reported at 589 F.2d 323. The opinion of the Court of Appeals unanimously denying petitioners' application for rehearing *en banc* was entered on March 26, 1979, and corrected on April 19, 1979; that opinion has not been reported, but is included in petitioners' Appendix (Petitioners' Appendix B, at 9a-10a). Prior to trial, the District Court filed an opinion respecting respondents' motions for summary judgment; that opinion has been reported at 432 F.Supp. 1122.

COMPANION PETITION

Respondents have previously filed their own separate petition for a writ of certiorari to review that part of the Court of Appeals' judgment reversing the jury's verdicts against Goldblatts (hereinafter defined). *Lawrence Butler, et al.* v. *Goldblatt Bros., Inc., et al.*, No. 78-1889. The present police officer petitioners are not parties to that petition.

QUESTIONS PRESENTED

I. Whether the Seventh Circuit's affirmance of the directed verdicts and judgments *n.o.v.* was supported by the evidence, even when viewed most favorably to the police, and conformed to applicable law.

II. Whether the "subordinate officer" defense may be considered by this Court on certiorari or is even seriously advanced by petitioners.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343, the Fourteenth Amendment to the Constitution of the United States, and the doctrine of pendent jurisdiction.

Nature of the Action

The respondents, Lawrence Butler, Ron Jackson, Charles James, Monroe Jenkins, James Nash and Estate of Nathan Nash, Deceased, brought an action for damages to redress violations of their federal civil rights under 42 U.S.C. §1983 and the Fourteenth Amendment, arising from their false arrest and imprisonment without warrants and without probable cause. Under the doctrine of pendent jurisdiction, respondents also claimed damages for violation of their rights under the law of the State of Illinois (common law false arrest and imprisonment).

The Parties

There have been, throughout this litigation, two separate sets of defendants. One set is composed of Chicago police officers; they are officers John McDonald, John Juriss, Frank Krause and John Kowalski. The other group is composed of Goldblatt Bros., Inc., a department store chain headquartered in Chicago, and its private security police employees, Thomas Marsh, Andre Walker and Dennis McFarland (often collectively referred to herein as "Goldblatts" or the "Goldblatts agents"). All of the respondents are truck drivers employed by Goldblatts. Although Ernest Lewis and Cecil Davis are listed in petitioners' caption, no judgments were entered below in their favor against the petitioning police officers, and they are not proper parties to the petition.

Proceedings in the District Court

This case was tried on Counts I (42 U.S.C. §1983) and III (false arrest and imprisonment under Illinois law) of respondents' third amended complaint. The District Judge, Bernard M. Decker, directed verdicts in favor of the respondents and against police officers McDonald and Juriss, specifically finding that the warrantless arrests were unconstitutional and made without a reasonable, good faith belief in the existence of probable cause. Judge Decker entered judgments *n.o.v.* in favor of petitioners Butler and Jenkins and against officers Kowalski and Krause, respectively, under *both* counts.

The evidence concerning the role of the police in the episode giving use to this litigation was not disputed in any material respect. In summary, the evidence was that on September 19, 1974, Goldblatts agents Marsh and Walker contacted police officer Krause and stated that they had received an anonymous telephone tip about a threat against Walker. (Krause, Tr. 727) The police refused to take any action. (Krause, Tr. 728) Later, Goldblatts called back with a different story, attributing the information to a paid, undercover informer employed by Goldblatt Bros., Inc. (Krause, Tr. 728) Still later, there was a meeting at Area 3 police headquarters between the police and the Goldblatts agents. (McDonald, Tr. 313-314; Juriss, Tr. 373; Krause, Tr. 727-730; Marsh, Tr. 533; Walker, Tr. 787)

At the September 19 meeting, the Goldblatt agents claimed to have received a warning from an unidentified informer that unnamed employees of Goldblatt Bros., Inc. planned to kill Walker if he testified in a theft case on September 25. The Goldblatts agents refused to disclose the identity of the alleged informer to the police.

(McDonald, Tr. 314; Juriss, Tr. 376-377; Marsh, Tr. 530-533; Walker Tr. 787-788) No details of the "plot", the parties supposedly involved, or the informer's sources were communicated to the police, and the meeting concluded with the agreement of the police to cover Walker's appearance in court. (McDonald, Tr. 319-320)

The police knew that the Goldblatts agents themselves had no direct knowledge of any unlawful activity by respondents. (McDonald, Tr. 316; Juriss, Tr. 377-379; Krause, Tr. 746-747; Walker, Tr. 828) The police did not ever investigate the matter. (McDonald, Tr. 321-325, 341-342, 347-348; Juriss, Tr. 379-408, 435-436; Gerl, Tr. 443, 452)

On September 25, Walker, under police surveillance, testified in the theft case against Jesse Green (never involved in this case) and Wayne Young (who—*unknown to the police*—was the alleged informer). (Walker, Tr. 826) Thereafter, Walker accused Ernest Lewis (*not* an employee of Goldblatt Bros., Inc., and *not* a respondent herein) of assaulting him in the Courtroom. (Walker, Tr. 797; Juriss, Tr. 390-391) Juriss had been "concentrating" on Walker at the time and did not observe any such incident. (Juriss, Tr. 389-390) (The police state that Juriss "had not seen the incident because he had preceded Walker out of the courtroom." Petition, at 6. This is a gross misrepresentation; Juriss testified that he was "concentrating" on Walker and "*followed*" him out the of courtroom. [Juriss, Tr. 389-390]) Nevertheless, Lewis was arrested. (Juriss, Tr. 391-393) The instant petition does *not* present any issue respecting the arrest of Lewis.

Later on September 25, the Goldblatts agents met again with the police at Area 3. They all agreed to return

to the Goldblatts warehouse where respondents would be pointed out by the agents and then arrested without warrants. (McDonald, Tr. 332-334, 340; Juriss, Tr. 405, 407). The police never took any action to even begin the warrant process. (McDonald, Tr. 326; Juriss, Tr. 373)

The police did not speak with the alleged informer until after the arrests were underway, and no attempt was ever made to determine his reliability. (McDonald, Tr. 313-316, 323-324; Juriss, Tr. 402-404; Gerl, Tr. 452). After being incarcerated, fingerprinted, and photographed, all of the respondents were released. None were charged with any offense, and the single charge against Lewis was subsequently stricken. (Lewis, Tr. 120). The jury awarded each of the respondents $5,000 in damages against both sets of defendants; it also awarded Lewis $6,630 against Goldblatts alone.

The Seventh Circuit Affirms

Both sets of defendants appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals held that there was no basis for any reasonable, good faith belief that the warrantless arrests of the respondents were based on probable cause and, therefore, *affirmed* the directed verdicts and judgments *n.o.v.* against the police officers. By unanmious vote, the Court of Appeals denied petitioners' application for rehearing *en banc*. (The Court of Appeals' reversal of the jury verdicts in favor of respondents and against Goldblatts is the subject of the companion petition described above.)

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT'S AFFIRMANCE OF THE DIRECTED VERDICTS AND JUDGMENTS N.O.V. WAS REQUIRED BY THE EVIDENCE, EVEN WHEN VIEWED MOST FAVORABLY TO THE POLICE, AND CONFORMED TO APPLICABLE LAW.

A. The Affirmance Was Not Only Not In Conflict With Applicable Law But Was Mandated By It.

Applicable law demonstrates that, even when the undisputed facts are viewed most favorably to the police, the Seventh Circuit correctly affirmed that the warrantless arrests of the respondents were not founded upon probable cause or a reasonable good faith belief therein. The record shows that the police made these arrests without any knowledge of the commission of an offense, except accusations attributed to an informer with whom the police never spoke and whose reliability they did not know. Such arrests are unconstitutional:

> . . . where the officer makes an arrest without any knowledge of the commission of a crime except from an informer whom he does not know to be reliable, the courts have consistently held there is no reasonable grounds for the arrest. *Rodgers* v. *United States*, 267 F. 2d 79 (9th Cir. 1959) at 85.

At no time did plaintiff-respondents, the District Court, or the Seventh Circuit, as the petitioning police suggest, ever argue that the law of probable cause prohibits police from making arrests on the basis of information "supplied by reliable informants, by-standers and victims." Petition, at 13. In fact, the *absence* of such reliable information was the basis for the District Court's imposition of

liability on the police and for the Seventh Circuit's affirmance.

The courts, including the Seventh Circuit in this case, have consistently held that the existence of probable cause depends on a determination of:

> Whether . . . at the moment the arrest was made . . . the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person arrested] had committed or was committing an offense. *Beck* v. *Ohio,* 379 U.S. 89 (1964) at 91.

Probable cause depends, then, on whether the police had reasonably trustworthy information justifying the arrest *at the time it was made.* As the Seventh Circuit noted, to demonstrate the trustworthiness of information attributed to an informer, the law requires a showing of the underlying circumstances which provide a basis for crediting the informer's story. At the very least, this has meant establishing the reliability of the informer or producing corroborative evidence independently obtained by the police as a result of their own observation, experience or investigation. See *McCray* v. *Illinois,* 389 U.S. 300 (1967); *Draper* v. *United States,* 358 U.S. 307 (1959); *Beck* v. *Ohio, supra*; *Rodgers* v. *United States, supra*; *Spinelli* v. *United States,* 303 U.S. 410 (1969); *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Butler, et al.* v. *Goldblatt Bros., Inc., et al.,* 432 F. Supp. 1122 (N.D. Ill. 1977).

Therefore, the Seventh Circuit's determination that the existence of probable cause "must hinge on the weight to be given the information that was supplied by the [informer]," Petitioners' Appendix A, at 4a, is in compliance with the foregoing principles and is *not* a "new definition" of probable cause.

As more fully discussed below, the petitioning police officers' *own evidence* established that they acted on the basis of inherently unreliable evidence. The police never spoke to *anyone,* much less a reliable police informant, bystander or victim, who claimed to have observed any criminal or suspicious conduct by any of the respondents. Further, the police testified that that they: (a) knew a week before the arrests that the accusations of the Goldblatts agents were merely repetitions of hearsay accusations which those agents claimed to have received from an unknown informer; (b) knew that the Goldblatts agents themselves had no direct knowledge of any unlawful conduct by any of respondents; (c) knew nothing about the alleged informer, his identity, reliability, or sources, and never even spoke with him prior to the arrests; (d) conducted no investigation and never independently corroborated the accusation; (e) never observed agent Walker to be in any danger; and (f) never attempted to secure arrest warrants.

No party to this litigation, or the courts below, have ever found a case in which the Constitutionality of an arrest, or a reasonable good faith belief therein, has been upheld on a record as barren as this. Neither *Jones* v. *United States,* 362 U.S. 257 (1960), nor *Draper* v. *United States,* 358 U.S. 327 (1957), inexplicably relied upon by the police, are in conflict with the decision of the Seventh Circuit. In both cases, the police dealt directly with the informer upon whose information they relied; the informer was well known to the police and had previously supplied reliable information; and, the information supplied was independently corroborated by the police. To

compare the "information" supposedly supplied by the informer in this case to that supplied by the informers in *Jones* and *Draper* betrays either a profound misapprehension of the law or an exceptionally careless analysis of the issues before this Court.

In applying the foregoing principles to the undisputed facts below, the Seventh Circuit correctly held that the police had failed to make the requisite showing either of the reliability of the informer or of independent police corroboration:

> . . . it is quite apparent that the police officers had no reasonable basis for believing [the informer] to be a reliable informant. The record discloses that the [police] did not have any prior experience with [the informer], and indeed did not even know that he was the individual supplying the information.
>
> By the same token, it is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations. [citations omitted] Petitioners' Appendix A, at 4a.*

Petitioners suggest that safeguards surrounding the use of informers should be ignored when the police act on the basis of unsubstantiated hearsay accusations attributed to an informer, whom the police do not know to be reliable, by intermediaries with no personal knowledge. Their argument is that the police have no obligation

* It should be noted that it is in connection with its second point (police failure to corroborate the accusation) that the Seventh Circuit discusses the absence of any "first-hand knowledge of any facts to support a belief that the six Goldblatt employees were engaged in criminal activity at the time [of their arrests]." Petitioners' Appendix A, at 5a.

to ever go beyond the last link in a long chain of hearsay within hearsay. It is the petitioners, not the Seventh Circuit, who would establish a "new definition" of probable cause.

B. The Undisputed Evidence Demonstrated That The Police Did Not Have Reasonably Trustworthy Information Giving Rise To Probable Cause.

1. The Police Did Not Know, Investigate, Or Establish The Reliability Of The Informer Or His Sources.

The law requires that, at the time of a warrantless arrest, the police have reasonably trustworthy information giving rise to probable cause or a good faith belief therein. Where the police obtain no independent evidence of alleged criminal conduct, and their *only* information is attributed to an informer, the reliability of the informer and his information must be established. Here, the police failed to meet these minimal requirements. They neither knew nor investigated the reliability of the unknown informer and, as noted by the Seventh Circuit, failed to even learn his identity prior to the arrests.

The testimony of officer McDonald concerning the informer demonstrated the ignorance of the police:

> Q. Did [Goldblatts agents] Marsh and Walker tell you that this information came from an informer?
>
> A. Yes, sir.
>
> • • •
>
> Q. Did Marsh and Walker refuse to tell you the name of the informer?
>
> A. Yes, they did.
>
> Q. Did you ask them if that informer had an arrest record?
>
> A. No, I did not. *It was their informant and not a police department informant.*

Q. Did you ask them if that informer was at that time a defendant in a criminal case?

A. No, I did not.

Q. Did you ask them if that informer had any personal disputes with any of the people who were supposedly involved in that conspiracy?

A. No, I did not. I merely inquired as to his dependability as far as they are concerned.

Q. Did you ask Marsh and Walker if their informer was being paid for acting as an informer?

A. No, I did not.

• • •

Q. Did you ask how long the informer had worked for Goldblatts?

A. No, I did not. . . .

Q. *Did you ask them how the informer came into possession of the information that there was supposedly a conspiracy against Walker's life*?

A. *No, I did not.* . . .

(McDonald Tr. 313-316, 323-324)

The law requires, however, that the police know that an informer is relying on "something more substantial than a casual rumor . . . or an accusation based merely on an individual's general reputation." *Spinelli* v. *United States,* 303 U.S. 410 (1960) at 416.

Further, the police knew from the start that the sole source of Goldblatts' "information" was the vague accusation attributed to the private informer with whom the police had no experience, *not* any event that the Goldblatts agents witnessed:

Q. *At that meeting did you have any information beyond what Marsh and Walker had told you that the informer had in turn told them*?

A. *No, sir.* . . .

(McDonald, Tr. 313-316, 323-324)

Juriss' testimony was the same:

Q. But you knew that [the informer] was the source of their information as to the story that they were telling you?

A. Yes.

Q. *Did they tell you on that date, or any other date,* with the exception of the Ernest Lewis incident in the courtroom, *that they had personally observed any plaintiff doing anything in connection with this supposed story that they had told you*?

A. *No, sir.*

• • •

Q. Was Wayne Young ever a direct informer for the police department?

A. Not to my knowledge. He never worked with me.

• • •

Q. And at the time of that arrest of that decision to arrest, *did you have any information of any kind beyond what Walker or Marsh had conveyed to the police department*?

A. *No, sir.*

Q. *You had no direct information from [the informer], is that correct*?

A. *I didn't personally, no, sir.*

(Juriss, Tr. 377-379, 402-404)

McDonald testified that he did not assign anyone to the specific task of investigating either the informer or the alleged conspiracy. (McDonald, Tr. 318-321, 348, 765-766). Juriss confirmed that the police never conducted the slightest inquiry:

Q. Up to that point in time [the day of the arrests] had anybody ever investigated [the informer] Wayne Young?

A. Not to my knowledge, counselor.

• • •

Q. Officer Juriss, at any time did you conduct an investigation of Wayne Young [the informer]?
A. No, sir, I did not.

* * *

Q. Are you aware of anybody else who conducted an investigation, either of Wayne Young or Ernest Lewis?
A. No, sir, I am not.

* * *

Q. [I]s this a case . . . in which the police department would be duty bound to investigate?
A. As the facts and circumstances developed, I'd say that *we did have an obligation in this case.*
Q. When did that obligation arise?
A. *On the 19th of September* [the week before the arrests] . . .
(Juriss, Tr. 379, 408, 414-415)

As did officer Gerl:

Q. Had you *ever* made an arrest on the basis of any information *ever* supplied by Wayne Young?
A. *No, I hadn't.*
Q. Did you *ever* undertake any effort to determine if Wayne Young was a *reliable informer*?
A. *No.*
(Gerl, Tr. 452)

The alleged informer was, when he allegedly passed his accusation to Walker, a defendant in the very proceeding in which Walker was to testify for the prosecution. (Young, Tr. 896) *None* of the respondents were involved in that proceeding. Young, the alleged informer, was the *only* party related to this case who could have been adversely affected by Walker's testimony. In addition, the Goldblatts agents were Young's superiors at Goldblatts. The impact of such a situation on the informer's reliability is obivous and, more significantly, could

have been discovered by rudimentary police investigation. The rationale for requiring police knowledge of the source and particulars of hearsay information is to prevent the type of abuses which occurred in this case:

> [T]he arresting officer in the exercise of his authority should not become the tool of an informant whose motivations run the gamut from sheer mischief to calculated self-aggrandizement. *Rodgers* v. *United States, supra*, at 267 F. 2d 88.

The arrests were not, then, based upon information supplied by "reliable informants, bystanders and victims." In a ludicrous attempt to avoid the safeguards surrounding the use of informers and the consequences of their ignorance, the police attempt to distance themselves from the unknown informer from whom they knew the accusation came, and they interposition Marsh and Walker between themselves and the informer. However, the police repeatedly admitted that the Goldblatts agents were not the informers and never claimed to have any direct knowledge of anything they said their informer had told them. Mere reliance upon unsubstantiated hearsay accusations attributed to an unknown informer, which accusations are filtered through intermediaries having no direct knowledge, are insufficient to give rise to probable cause. As Judge Decker stated below:

> The [police] apparently recognize that the arrests cannot be justified upon the reliability of the informant. They thus state "it was not the informant that provided the information concerning the plot to kill Mr. Walker but rather Mr. Walker himself and Mr. Marsh." *This does not cure the unreliability of the story. Walker and Marsh lacked first-hand knowledge of the truth of their information. There is no shortcut to probable cause. It can be no more obtained*

> *by filtering a second-hand tale through a well-known informant than will pure hearsay become admissible because the witness has a reputation for honesty.* *Butler, et al.* v. *Goldblatt Bros., Inc., et al.*, 432 F. Supp. 1122 (N.D. Ill. 1977) at 1126 (emphasis added).

As noted by Judge Decker, hearsay accusations of unknown informers cannot give rise to probable cause, or a reasonable, good faith belief therein, *because* they are repeated to the police by persons with no personal knowledge. That is doubly true, when, as here, the informer, his sources, his credibility, and his accusations are never investigated by the police:

> It is certain that mere suspicion, common rumor or report do not afford probable cause for arrest. *People* v. *Jones*, 31 Ill. 2d 42, 198 N.E.2d 821 (1964), at 198 N.E. 823.

Because the police never investigated and did not speak with the informer prior to the arrests, they could not know whether the report was based on anything more than "mere suspicion." The police did not meet the minimal requirements for establishing the trustworthiness of their information. The interests of law enforcement and of the rights of private citizens were *both* ignored.

2. The Accusation The Police Received Was Not Credible And Was Not Investigated.

The accusation the police received through the Goldblatts agents was inherently unreliable not only because it came from an unknown informer of unknown reliability, but also because it was barren of substance and detail. Even had the accusation come from a trusted police informer, it would have been insufficient to give rise to probable cause. The police testimony demonstrated that

the story they received was nothing more than a rumored, vague accusation. The police "knew" no underlying details; they did not even make an effort to obtain, much less investigate, any details of the accusation:

> Q. Did you ask Mr. Marsh and Mr. Walker on the 19th of September if there had been overt acts in furtherance of this alleged conspiracy to murder?
> A. No.
> Q. What about any time after that?
> A. I don't recall that I did.
> (McDonald, Tr. 771)

And, Juriss testified:

> Q. On September 19th, 1974, the date of the first meetings between the police and Goldblatt's, did Lieutenant McDonald order anybody to conduct any sort of investigation in connection with or with respect to the alleged conspiracy?
> A. No, sir.
> (Juriss, Tr. 379)

The police never produced any details of the alleged conspiracy beyond the accusation. When pressed for particulars of the story within his knowledge, McDonald testified to virtually nothing except his recollection that "somebody had made a threat." (McDonald, Tr. 342-344) Whatever vague connection there was alleged to have been between the "threat" and Walker's expected testimony in the Young-Green matter, it was not deemed worthy of police investigation, and the police did not take the threat seriously. (McDonald, Tr. 321, 341; Krause, Tr. 728)

Although the police had only the accusation about the "plot," they had even less information about the persons supposedly involved. Until moments before the arrests,

the police had not even received an accusation naming any of the six. They testified they had no prior dealings with the six, did not know them, and prior to September 25 had not even heard their names. (See, *e.g.*, McDonald, Tr. 339, 346; Jurris, Tr. 371-372, 407; Krause, Tr. 737) There certainly was no information linking respondents to the bogus conspiracy. The police established no basis for crediting the hearsay within hearsay passed to them by the Goldblatt agents and produced no underlying objective details to support it. This Court has held tips barren of such details inherently unreliable:

> In the absence of a statement detailing the manner in which the information was gathered, *it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor* . . . or on an accusation based merely on an individual's general reputation.
>
> • • •
>
> This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar. *Spinelli* v. *United States, supra,* at 303 U.S. 416.*

The most that the police ever claimed to have had at the time of the arrests was the "meager report" of the Goldblatts agents that an unknown informer had learned in an unknown way that a group of unknown persons were somehow connected to a vague plan to harm Walker. The police knew nothing from their own experience or observation except what Marsh and Walker chose to

* The only source of information that the informer ever claimed to have against the respondents was the very sort deemed suspect by the Supreme Court in *Spinelli*: offhand remarks alleged to have been overheard at a neighborhood bar.

tell them, and that was precious little. That the Goldblatts agents were so willing to finger the respondents for arrest cannot, as far as the police are concerned, cure the overwhelming defects of the story.

3. The Police Never Independently Corroborated The Informer's Story.

Recognizing that they failed to establish the informer's reliability, the police argue that they independently corroborated the unknown informer's accusation. This argument is defeated, first, by the police admission that they had no independent corroboration: "[The police] had no direct knowledge of the events constituting probable cause." Police February 17, 1978 Brief in the Seventh Circuit, at 14.

Second, the police base their argument on Walker's accusation that Ernest Lewis (not a respondent) assaulted him in the courtroom. That line of reasoning is nonsense: The police never saw, much less corroborated, the alleged incident. In fact, *their own observations tended to discredit* rather than corroborate Walker's accusation.

There is no dispute that Walker was under continuous police surveillance on September 25 (Stipulated Facts ¶I-12; R. 88); that officer Juriss had Walker under surveillance in the courtroom (Juriss, Tr. 388-390); that Walker alone claimed that, while he was walking out of the courtroom, "Ernest Lewis grabbed him by the arm and said 'Well, that's it for you'" (Juriss, Tr. 390); and, that Juriss' own observations demonstrated the falsity of Walker's accusation:

> Q. *Did you observe Ernest Lewis in the courtroom?*
>
> A. *Yes, sir.*

Q. Now, after the case was over and Young was cut loose and the prosecution was continued against Green, what happened? *Did you observe Walker walking out of the courtroom?*

A. *Yes, I did.*

Q. *While he was walking out did things appear ordinary to you?*

A. *Yes, they did.*

Q. *Did you see Lewis touch Walker?*

A. *No, sir, I didn't.*

Q. *Did you see Lewis say anything to Walker?*

A. *No, I didn't.*

Q. *Did you hear Lewis say anything to Walker?*

A. *No, I didn't.*

Q. *Where was Gerl while Walker was walking out?*

A. I am not too sure of Investigator Gerl's location. *I was concentrating my efforts on Walker.*

Q. *Did you follow Walker out of the courtroom?*

A. *Yes, I did.*

(Juriss, Tr. 389, 390)

In view of their own testimony, it is clear that the police had no independent knowledge of any untoward conduct directed against Walker. The alleged incident could not amount to independent police corroboration. It was only Walker making another accusation. It was *Walker corroborating Walker,* and not "information gathered by the arresting officer." *Draper* v. *United States,* 358 U.S. 308 (1959). Therefore, the story of the alleged courtroom incident did not meet the minimal requirements of independent police corroboration.

In any event, Walker's accusation of Lewis provided no corroboration of any alleged conspiracy, much less of any involvement of respondents. The police had no knowledge of any link between the alleged incident and

anyone else. The alleged Lewis remark could never fill that gap.

None of the police *ever* testified to having observed *any* dangerous conduct directed against Walker *at any time,* nor did Walker make such a claim with respect to any of the respondents. There were no incidents known to the police which corroborated the informer's story that Walker was in danger from respondents.

The record shows a total lack of any independent corroboration that any conspiracy existed or that any of the respondents were involved therein. Judge Decker stated it well below:

> The basis for the arrests of the [respondents], however, differs markedly from that of Lewis. While Lewis was arrested upon the immediate report of a perceived threat by a direct witness, *the [respondents] were connected to the purported conspiracy only by the unverified charge of an unknown informant.* In the six days since this hearsay had been presented to the police, the law enforcement officials *had attempted no investigation of its veracity.* Unlike the case of Lewis, *no new report of actual incriminating conduct had been brought against these [respondents].*
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> It appears that the police initially sought the name of the informant. This, in itself, indicates that they were aware of the importance of confirming his reliability. The failure to pursue this inquiry, or to otherwise substantiate the story indicates that the police did not feel that the Walker hearsay justified any immediate action. *Yet it remains true that the evidence against these [respondents] was no greater at the time of the arrests than on September 19, when Walker first approached the police. Lewis' purported threat could have no bearing upon these individuals*

> *unless the story linking all the* [*respondents*] *in a conspiracy had some independent credibility. Butler, et al.* v. *Goldblatt Bros., Inc., et al., supra,* at 432 F.Supp. 1125-1126 (emphasis added).

The Seventh Circuit agreed:

> By the same token, it is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations. Indeed, the [police] had *no first hand knowledge of any facts* to support a belief that the six [respondents] were engaged in criminal activity at the time they arrested them. Accordingly, we have no difficulty in concluding that a reasonable man could not find that the arrests were based on probable cause. Petitioners' Appendix A, at 4a-5a.

C. The Evidence, Even When Viewed Most Favorably To The Police, Demonstrates That There Could Not Have Been A "Reasonable Good Faith Belief" That Probable Cause Existed For The Arrest Of Respondents.

The contention of the police that the reasonableness of the arrests should have been resolved by the jury is without foundation. The parameters of the "good faith" defense have been discussed by the courts in a series of recent decisions, including *Pierson* v. *Ray,* 368 U.S. 547 (1977); *Bivens* v. *Six Unknown Agents,* 456 F.2d 1339 (2nd Cir. 1972); *Ammlung* v. *Chester,* 355 F.Supp. 1300 (E.D. Pa. 1973); *Joseph* v. *Rowlen,* 402 F.2d 367 (7th Cir. 1967); *Boscarino* v. *Nelson,* 377 F.Supp. 1308 (E.D. Wisc. 1974); *Brubaker* v. *King,* 505 F.2d 534 (7th Cir. 1974), and *Glasson* v. *City of Louisville,* 518 F.2d 899 (6th Cir. 1975).

In *Brubaker, supra,* the Seventh Circuit stated the rule governing the "good faith" defense as follows: "there is only a valid defense if the arrest was made *both in good faith and with a reasonable belief in its constitutionality.*" *Id.,* at 505 F.2d 537 (emphasis added). The recent decisions make clear that the "good faith" defense involves two separate "tests." First, the arresting officer must have a "reasonable belief" in the existence of probable cause which is "clearly an *objective* and not a subjective test." *Boscarino* v. *Nelson, supra,* at 377 F.Supp. 1311 (emphasis added). Second, there must be "subjective" good faith on the part of the officer. Subjective good faith alone does not, however, constitute a defense to a §1983 action, and, in the absence of a "reasonable" belief (measured by the *objective* standard), no inquiry into the subjective element is necessary. *Glasson* v. *City of Louisville, supra; Brubaker* v. *King, supra; Boscarino* v. *Nelson, supra.* Application of these principles to the undisputed evidence demonstrates that the police met *neither* test.

The police had approximately a week to investigate the accusations and the informer, yet failed to do so. They did not *ever* determine the reliability of the informer or his "information" and did not even speak with him before the arrests. None of the police ever observed any of the respondents engaged in any untoward activity, and they never observed Walker to be in any danger. The police had no direct knowledge of any objective data which would support "reasonable beliefs of prudent men under the circumstances" that the six respondents had or were committing an offense. *Boscarino* v. *Nelson, supra,* at 377 F.Supp. 1311. *Nor did they have any second-hand knowledge directly from an informant or anyone else*

who claimed to have any first-hand knowledge respecting the six respondents. No matter how favorably to the police the evidence is viewed, there can be no dispute as to their failure to meet the objective test of the "reasonable, good faith belief" defense. Thus:

> The court must conclude as a matter of law that these arrests were not founded upon probable cause and that the [police] *could not reasonably believe that there was probable cause for these arrests.* As a result, the court must conclude that [the respondents] Butler, Jenkins, James, Jackson, and the two Nashes were deprived of due process of the law. *Butler, et al.* v. *Goldblatt Bros., Inc., et al., supra,* at 432 F.Supp. 1126 (emphasis added).

Although, in view of the above, no inquiry into subjective good faith is required, the undisputed evidence also demonstrated that the police did not have even a *subjective* good faith belief. This Court has held that arrests made for "investigation" or "questioning" are demonstrative of an absence of subjective good faith:

> The illegality here, moreover, had a *quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for questioning.*
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> • • •
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> The arrest, both in design and in execution, was *investigatory.* The detectives embarked upon this expedition for evidence *in the hope that something might turn up. The manner in which* [*the*] *arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion. Brown* v. *Illinois,* 422 U.S. 590 (1975) at 605 (emphasis added).

Officer Juriss put the skids to any claim of subjective good faith on the part of the police:

> Q. *So, they were arrested for interrogation?*
> A. *That is correct.*
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> • • •
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> Q. Was there any offense that they were arrested for?
> A. They were arrested for that purpose, counsel.
> Q. *And not because they had committed an offense?*
> A. *Not that was determined at this time.*
> (Juriss, Tr. 423)

McDonald's testimony was the same: "I felt . . . that *we should bring the people in for questioning.* (McDonald, Tr. 332) Kowalski testified to the same purpose:

> Q. Isn't it a fact that you arrested Butler *for the purpose of interrogation?*
> A. *In a way I suppose you could put it that way. I felt that, when I arrested Mr. Butler, I did not have enough to charge him with anything.*
> (Kowalski, Tr. 764)

What is more, although McDonald decided to release some of the so-called "conspirators," even *before* others were arrested (McDonald, Tr. 325), the arrests continued. The reason: "I felt that . . . I may still come up with a lead that would open up the case." (McDonald, Tr. 774) McDonald admitted, however, that he did *not* believe the arrests were lawful:

> Q. Was it your belief at that time that you could arrest people and have them brought—or have people arrested—and have them brought down to Area 3 for the purposes of interrogation?
> A. *No, it was not.*
> (McDonald, Tr. 774)

The foregoing admissions clearly show that the police did not have a subjective good faith belief in the existence of probable cause and are fatal to any such claim by them.

There was, then, no issue for the jury to resolve. The police officers' own testimony established that they had neither reliable evidence to support a reasonable belief in the existence of probable cause under any objective standard nor any subjective belief in the existence of probable cause. Under the circumstances, Judge Decker had no alternative except to direct verdicts and enter judgments *n.o.v.* in favor of the respondents and the Seventh Circuit had no alternative except to affirm those verdicts. As Mr. Justice Frankfurter wrote:

> The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge. *Wilkerson* v. *McCarty*, 336 U.S. 53 (1949) at 65.

II.

THE "SUBORDINATE OFFICER" DEFENSE WAS NOT RAISED IN THE COURT OF APPEALS AND IS FRIVOLOUS.

The police argue, finally, that officers Kowalski and Krause are immune from liability because the arrests which they *admitted* making were carried out under the supervision of McDonald and Juriss. Petition, at 14-15. This argument was not urged or briefed in, and was not considered by, the Court of Appeals. Therefore, it is not a matter for consideration by this Court on certiorari.

Tyrrell v. *District of Columbia*, 243 U.S. 1 (1917); *California* v. *Taylor*, 353 U.S. 553 (1957); Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978) §6.27.

In any event, petitioners' argument is frivolous and predicated upon a gross misreading of *Whitely* v. *Warden*, 401 U.S. 560 (1971), a habeas corpus-warrant case in which the liability of the arresting officer was *not* at issue. Examination of the *Whiteley* opinion discloses that this Court actually *rejected* the argument now advanced by the police:

> [A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.
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> • • •
>
> The arresting officer [who received the radio report] was not himself possessed of any factual data tending to corroborate the informer's tip that [the petitioner] committed the crime. Therefore, petitioner's arrest violated his constitutional rights . . . Id., at 401 U.S. 568-569.

Further, Krause and Kowalski were not mere recipients of a bulletin concerning a matter with which they had no prior connection. They were both familiar with the case and active participants in the events leading to the arrests as well as the actual arrests; in fact, Krause was the *very first* police officer contacted by the Goldblatts agents nearly a week before the arrest (Krause, Tr. 727-728), and both officers were as deeply involved in the entire episode as McDonald and Juriss, or more so.

CONCLUSION

For the reasons above stated, the police officers' petition for a writ of certiorari should be denied.

Respectfully submitted,

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